DOCUMENT RESUME

ED 229 692 CG 016 663

AUTHOR	Stewart, Donald E.; Harrison, Margaret
TITLE	Divorce in Australia. Working Paper No. 5.
INSTITUTION	Institute of Family Studies, Melbourne (Australia).
REPORT NO	ISBN-0-642-88650-4
PUB DATE	Oct 82
NOTE	12p.
PUB TYPE	Information Analyses (070) -- Reports - Research/Technical (143)
EDRS PRICE	MF01/PC01 Plus Postage.
DESCRIPTORS	*Court Doctrine; *Court Role; Demography; *Divorce; Foreign Countries; *Legislation; Marital Instability; Parent Child Relationship; Remarriage; Social Change; Social Problems; Spouses; State of the Art Reviews
IDENTIFIERS	*Australia; *Child Custody

ABSTRACT

This working paper discusses the effects of recent legislative changes regarding divorce in Australia. The introduction describes the 1975 Family Law Act and gives a summary of its principles. The second section presents background information to the Act and lists the philosophical principles behind its formation. The third section describes changes in the divorce rate since 1975; statistical tables are provided. The fourth section discusses the current Family Court system, grounds for divorce, maintainance and property proceedings (including a list of factors which the court must consider for these proceedings), and child custody and access issues (including descriptions of the two major possible outcomes, i.e., parents are given joint custody, or one parent is awarded custody with access to the other parent reserved). The fifth section considers the effects of divorce on children, and the last section briefly reviews several issues related to divorce in Australia which are currently the subject of debate. A bibliography is included. (WAS)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

ED229692

CG 016663

5 October 1982

WORKING PAPER

Divorce in Australia

by Donald E. Stewart and
Margaret Harrison

U.S. DEPARTMENT OF EDUCATION
NATIONAL INSTITUTE OF EDUCATION
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

X This document has been reproduced as received from the person or organization originating it.

☐ Minor changes have been made to improve reproduction quality.

• Points of view or opinions stated in this document do not necessarily represent official NIE position or policy.

"PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY

M. Davis

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

Institute of Family Studies

Institute of Family Studies WORKING PAPER

No. 5 October 1982

© Institute of Family Studies 1982
766 Elizabeth Street
Melbourne 3000 Australia
Telephone (03) 342 9100

October 1982

National Library of Australia
Cataloguing-in-publication data

Stewart, Donald E., 1947-
Divorce in Australia.

Bibliography.
ISBN 0 642 88650 4.

1. Divorce – Australia. 2. Harrison, Margaret.
3. Australia. Institute of Family Studies.
I. Title. (Series: Institute of Family Studies working paper; no. 5).

306.8'9'0994

ISSN 0725-2420

Typeset by Bookset Melbourne
Printed by Globe Press Pty Ltd

Contents

Introduction 1
Background to the *Family Law Act (1975)* 1
Changes in divorce rates since 1975 2
The divorce process and The Family Court 4
Children and divorce 7
Review 8
Bibliography 9

Introduction

Despite progressive liberalisation from the 1850s until the beginning of this century divorce, as we know it today, was infrequent. Until the 1959 Commonwealth *Matrimonial Causes Act*, each State in Australia was responsible for its own legislation relating to matrimonial causes, which meant laws varied. However the 1959 Act, which came into force in 1961, established uniform grounds for the dissolution of marriage throughout the Commonwealth. Dissolution could be granted on one or more of 14 grounds including desertion, adultery, cruelty, and separation for five years in certain circumstances.

The 1975 *Family Law Act* repealed the *Matrimonial Causes Act* and provided for a single ground for divorce — irretrievable breakdown of marriage — and for nullity of marriage on the ground that the marriage is void. The *Family Law Act* was a major law reform, in that it swept away the concept of 'fault' as a basis for divorce, and recognised equality between husband and wife in their marital rights and responsibilities. Divorce can now be obtained by one party with or without the consent of the other party, provided the Family Court is satisfied that the parties separated (and lived separately and apart) for a continuous period of not less than 12 months immediately preceding the filing of the application for dissolution.

Mr Justice Watson, Senior Judge of the Family Court, (Watson 1980) has summarised the principles of the Act as follows:

1 Twelve months actual separation is the only basis for divorce.
2 Such separation may be interrupted by a reconciliation of up to 3 months and the periods before and after aggregated.
3 On divorce the court will be concerned to ascertain what is happening to the children. Aside from proper maintenance, it will enquire into the children's relationship with each parent.
4 If there is a dispute over the occupancy of the matrimonial home and there are children living at home, their future welfare will be the court's major concern — questions of spousal conduct may have to bow to the question of who is the primary caretaker and should that spouse remain in the home with the children.
5 The actual care and control of children will normally be best carried out by the spouse who has been the primary caretaker (irrespective of sex) if that spouse has the appropriate parenting capacity.
6 A spouse may only obtain maintenance from another spouse if he or she needs it and the other can afford it after meeting his or her reasonable obligations, including the support of a second spouse and children.
7 The availability of social security is to be fully taken into account in assessing maintenance.
8 Each spouse will be expected to contribute financially to a child's maintenance if that spouse is economically able to.
9 The perceptions of children 14 and over as to where and with whom they wish to live will carry the day unless there are exceptional circumstances.
10 Distribution of property is based not only on economic contribution but also on contribution as a homemaker and parent.
11 Costs are not normally awarded by the court against either party.
12 Means-tested legal aid is available to assist parties who may not be able to afford their own costs.
13 Applicants in simple matters, including divorce, who prepare their own applications and appear by themselves are generally assisted by court staff and accepted by the judges.

Background to The Family Law Act 1975

Prior to and since the 1975 Act, there has been considerable discussion concerning the philosphy of the Act. The Chief Judge of the Family Court, Justice Elizabeth Evatt, has said that the Act was introduced 'to bring about a more humane and dignified manner of dealing with the problems of marital breakdown without delay and without overburdening the parties with expense' (Evatt, 1978). The maximum fairness, and the minimum bitterness, distress and humiliation were important principles underlying the framing of the Act, as also was the encouragement of conciliation to promote harmonious relationships between the parties and their children in the future. It was recognised that the breakdown of marriage required more than legal solutions, and that besides the judicial process, divorcing couples needed help to overcome their feelings of bitterness and hostility. It was considered that the public had no right or need to know of the often traumatic events or 'faults' of a couple in order to conclude that a marriage had finally broken down, and that the humiliation, embarrassment and bitterness often associated with 'fault' could be dealt with by the Court with speed and dignity and a concentration of the needs of the children.

The basic principles of the Act as outlined by the report of the Joint Select Committee on The Family Law Act (Australia, Joint Select Committee, 1980:3) are that:

Institute of Family Studies WORKING PAPER No. 5 October 1982 1

- a good family law should buttress, rather than undermine, the stability of marriage;
- where a marriage has irretrievably broken down the legal shell should be destroyed with the maximum fairness and the minimum bitterness, distress and humiliation;
- the future of the children of a broken marriage needs to be considered by the best possible tribunal assisted by the skills of welfare officers and other counselling staff where needed;
- the financial dispute between the spouses should be resolved as quickly and as finally as possible;
- the whole process should be performed with dignity, relative privacy and as little expense as possible.

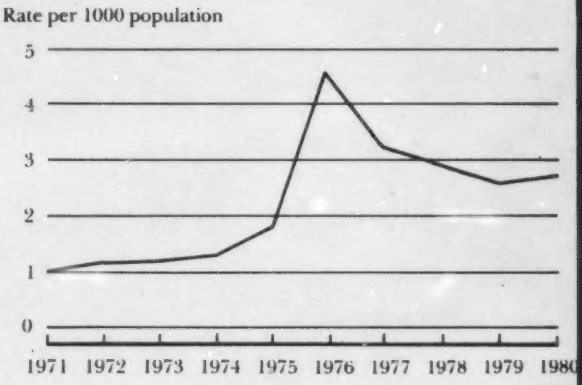
Changes in Divorce Rates Since 1975

It was to be expected that such an important change in the legislation regarding divorce was going to be subject to close scrutiny. The *Family Law Act* has been, and will probably continue to be, criticised on various grounds. The ammunition for such criticism has rested largely on the significant increase in divorce rates, and their fluctuations, since 1976. For example, in the first year of operation of the Act the number of divorces rose from 24 307 (1975) to 63 267 (1976). Critics of the *Family Law Act* have claimed that the law produces changed attitudes towards marriage, in particular by undermining marital commitment and family stability. Others claim that 'divorce is the result of a broken family and not vice versa, and that the State, in granting a divorce, merely gives recognition and legal status to an already accomplished social fact' (Ozdowski & Hattie, 1981:6).

To put the changing divorce rates in context, it should be noted that, since World War II, Australia has experienced a 'marriage revolution', and among both sexes there has been a great increase in the proportion of the population who have ever been married. By 1971 marriage had become almost universal — 86 per cent of men had married before age 35 (compared to 67 per cent in 1933), and 94 per cent of women (compared to 78 per cent in 1933). The popularity of marriage inevitably drew into it many who had no vocation for it, and obviously not everyone who marries is well prepared or well suited to the state of marriage or to their chosen mate. When combined with a post-war baby boom (starting in 1946), and a median age at marriage of 23 for males and 21 for females, together with a median duration of marriage (for those marriages which end in divorce) of about 10 years, it was extremely likely that there would be a 'divorce boom' starting in the mid 1970s (Edgar, 1981).

In fact, what has been happening (see Figure 1) is that divorce rates have been rising slowly since 1969 (when it was less than 1 per 1000 population) to 1.3 per 1000 in 1972, and 1.8 in 1975 (or 24 307 divorces). With the introduction of the *Family Law Act* in 1976, the divorce rate leaped to 4.6 per 1000 population (or 63 267 divorces). Since 1976 the rate declined to 2.6 in 1979. However in 1980 there was a slight rise in the number of divorces granted to 2.7 per 1000 population (or 39 258 divorces). This is 3.7 per cent more than the number granted in 1979 — the first increase since 1976.

Figure I: Crude Divorce Rates, 1971-80



Source: Divorces Australia 1980. Australian Bureau of Statistics, Cat. No. 3307.0

It could be expected that there would be high numbers of divorces following the legislative changes, not only because they reduced costs, simplified procedures and removed the need to establish cause, but also because some people may have held over their applications in 1974 and 1975 in anticipation of the new legislation. This is suggested by the figures that show an increase in the number of petitions lodged of only 6 per cent for the period 1974-75, compared with increases of 12 per cent for the period 1972-73 and 26 per cent in 1973-74.

No one disputes the fact that there has been a steep rise in the number of divorces. In 1979 the number was 56 per cent higher than in 1975, but given the points raised above, it would appear that the gradual increase in divorce rates since 1969 was interrupted dramatically by the enactment of the

Family Law Act, but has declined since then to a predictable straight line increase, which is now closer to the long-term Australian trend and to the experience of other industrialised countries. Nearly one quarter of the 63 267 divorces in 1976 were instituted under the *Matrimonial Causes Act*, and therefore cannot be attributed to the new Act. In addition, since all divorces granted in 1976 had to be based on 12 months continuous separation, the new Act could not immediately have **caused** this leap. In fact recent research has shown that some of the marriages dissolved in 1976 under the *Family Law Act* had broken up as long as 56 years before the Act was passed, and about 8 per cent were pre-1969 separations (before the proposed new Act was even being discussed Edgar) (1981). As Edgar points out: 'clearly a distinction must be made between the Act's "causing" marital breakdown and the Act's "causing" divorce as a legal act'.

The figures indicate that divorce is taking place earlier in marriage. In the early 1970s the median duration of dissolved marriages was about 11.9 years, by 1978 this had reduced to 10.5 years, and by 1980 to 10.2 years. In fact the largest increase in the proportion of divorces related to the duration of the marriage has been for divorces involving marriages of under 5 years' duration. In 1966, the proportion was 7.9 per cent of all divorces in this group; ten years later, in 1976, the proportion was 15.5 per cent and each year since then there has been an increase with this proportion being 20.7 per cent in 1980. Table 1 shows that under the pre-1976 *Matrimonial Causes Act*, the proportion of this group getting divorced was slightly under 10 per cent.

Associated with this shortening of the duration of marriage, the median age of those getting divorced has gradually declined.

As Table 2 shows, the median age for divorce for husbands fell from 37.9 years in 1971 to 35.3 years in 1980 and for wives from 34.4 to 32.7 years. For those divorcing in these ten years, the median age at marriage was relatively stable at 23.4 for husbands and 20.9 years for wives (See Table 1).

Table 1: Trends in marriage and divorce in Australia, 1966, 1971-1989

	Marriages	*Divorces*	*Median Age at Marriage: first marriage and all marriages (general population)*		*Duration of Marriage (in years)*	*% Divorce in First 5 Years or Less of Marriage*
			Groom	Bride		%
1966	96 046	10 738	first 23.9	21.2	13.9	7.9
			all 24.2	21.5		
1971	117 637	13 002	23.4	21.1	12.5	9.3
			23.8	21.4		
1972	114 029	15 655	23.3	21.0	12.1	10.0
			23.8	21.4		
1973	112 700	16 195	23.3	21.0	11.8	10.0
			23.9	21.4		
1974	110 673	17 744	23.3	20.9	11.8	9.5
			23.8	21.4		
1975	103 973	24 257	23.4	21.0	11.6	9.9
			24.1	21.6		
		Introduction of *Family Law Act 1975* on 5 January 1976				
1976	109 973	63 267	23.6	21.2	11.0	15.5
			24.9	22.2		
1977	104 918	45 175	23.8	21.4	10.9	17.3
			25.2	22.5		
1978	102 958	40 608	23.9	21.4	10.5	19.3
			25.4	22.7		
1979	104 396	38 021	24.1	21.7	10.3	20.1
			25.6	22.9		
1980	109 240	39 258	24.2	21.9	10.2	20.7
			25.7	23.0		

Sources: Australian Bureau of Statistics, *Australian demographic statistics quarterly December 1979 and March 1980*. Canberra.
Australian Bureau of Statistics, *Marriages Australia, 1972-1980*. Canberra. Cat. No. 3306.0
Australian Bureau of Statistics, *Divorces Australia, 1972-1980*. Canberra. Cat. No. 3307.0

Table 2: Ages at Marriage and Divorce, 1971-80

	Median age at marriage		*Median age at divorce*	
	Husbands	*Wives*	*Husbands*	*Wives*
1971	23.7	21.0	37.9	34.4
1972	23.8	21.4	37.3	34.0
1973	23.9	21.4	36.8	33.6
1974	23.9	21.9	36.8	33.7
1975	23.3	20.8	36.2	33.1
1976	23.4	21.0	36.2	33.1
1977	23.3	20.7	36.1	33.0
1978	23.3	20.8	35.7	32.7
1979	23.4	20.8	35.6	32.8
1980	23.4	20.9	35.3	32.7

Source: Australian Bureau of Statistics, *Divorces Australia*. Canberra. Cat. No. 3307.0

One aspect of divorce which is often overlooked is that there is a small but increasing proportion of divorces in which one or both partners had been divorced previously. This group formed about 6.5 per cent of all divorced couples in 1977, but by 1980 8.5 per cent of divorces involved a husband who had previously been divorced, and 8.4 per cent in which the wife had been divorced. With the rise in the number of divorced people re-marrying these figures are likely to increase; for example in 1968 one in eight of all Australian marriages involved partners of whom one or both had been married previously; by 1978 this had increased to one in three (McDonald 1974; 1980). In 1976, most marriages above age 30 were remarriages, and as many as 80 per cent of people who divorce before age 30 remarry within six years. Recent evidence suggests that contrary to conventional wisdom, the divorce rate is **higher** in remarriages after divorce. Overall the divorce rate for couples where one or both partners previously had been married and divorced increased from 11.2 per cent in 1976 to 12.9 per cent in 1979. In 1976 divorce cases, 47.9 per cent of these 'remarrieds' separated within 4 years of the second marriage, and each year this figure has risen to reach 55.6 in 1980. Edgar (1981) comments that despite potentially greater maturity, less hasty decisions and better financial job security, the divorce rate is higher in remarriages after divorce in many Western countries. Possible explanations may include problems with step-parenting, adjusting to a new partner, and often having to support a previous family as well as establishing a new home.

One of the major areas of concern, both in the framing of the 1975 Act, in the operation of the Family Court, and in the wider community, has been the impact of divorce on the children of the marriage. About 5 per cent of all children under 18 have been affected by divorce since 1976 (about 276 000). In statistical terms there has, in fact, been a slight increase in the proportion of dissolutions involving marriages with no children. This proportion was 31.7 in 1974 and gradually increased to 39.4 per cent in 1980. As shown in Table 3 there has been a corresponding decrease in the proportions of divorces of couples with three or more children (19.9 per cent in 1974 to 14.0 per cent in 1980). The trend for divorce to take place earlier in marrige and for over one fifth of divorces to occur within the first five years of marriage, combined with the fact that many couples delay the birth of their first child from the first five years to the second five years of their marriage, provides some explanation for the decline in the proportion of children (though not in absolute numbers) involved in divorce.

Table 3 shows a fall in the total number of children involved in divorce since 1976 until 1980 when the number started to rise. The total of 46 836 represents an average of two children per divorce of couples with dependent children. Of such couples, in 1979 over half (51.6 per cent) had the youngest child aged less than 7 and over one third (34.2 per cent) had a child aged less than 5 years.

It should not be assumed that the divorce statistics provide a 'true' picture of marriage breakdown in Australia. Evidence in the United Kingdom for example (Dunnell, 1976: 35) indicates that the proportions of women divorced at given marriage durations were, on average, about half the proportions separated, thus among those women first married between 1961 and 1965, 11 per cent had separated by ten years marriage duration, but only 6 per cent had actually divorced. There are further problems associated with 'de facto' or informal marriages (Harrison, 1981) and these will be briefly discussed below. However some description will now be given of the divorce process and features of the Family Court.

The Divorce Process and the Family Court

Family Court of Australia

The *Family Law Act* established the Family Court of Australia as a specialised court with judges appointed by reason of their training, experience and personality making them suitable people to deal with family law matters. The Family Court is by far the largest federal court in Australia, with forty judges holding office currently, including a chief judge and eight senior judges. In addition, each court is staffed with court counsellors, a registrar and (where necessary) deputy registrars. The court is required to proceed without undue for-

Table 3: The Proportion and Number of Children Involved in Divorce, 1975-1980

	Number of Children							
	0	1	2	3	4	5	6+	TOTAL
1975	32.4	22.5	24.9	12.5	5.2	1.6	0.9	34 992
1976	37.3	23.3	22.8	10.7	4.0	1.2	0.6	73 645
1977	36.3	23.2	24.4	10.8	3.7	1.1	0.5	57 878
1978	36.9	22.5	24.7	10.7	3.8	1.1	0.4	51 599
1979	38.7	21.6	25.1	10.2	3.3	0.8	0.3	46 130
1980	39.4	21.4	25.2	9.9	3.0	0.7	0.3	46 836

Source: Australian Bureau of Statistics, *Divorces Australia*, Canberra. Cat. No. 3307.0

mality and to endeavour to ensure that proceedings are not protracted. To this end neither judges nor barristers wear wigs or gowns and the court is closed to the public. It is likely that amendments to the Act will open the courts, whilst tight controls are placed on publication of identifying information regarding court clients. The philosophy behind the courts being open is that justice must be seen to be done, whilst the drafters of the Act, when it was originally introduced, were more concerned that people's private affairs should remain private.

The Family Court of Western Australia is a state court and has jurisdiction to hear matters arising out of the *Family Law Act*, together with adoption, affiliation and other broader family law issues. The court is staffed with a chairman of judges (who is also a senior judge of the Family Court of Australia) and four other judges, together with counsellors and registrars. The Family Court of Western Australia has always been open to the public.

Appeals from the Family Court are to a Full Court consisting of three judges and in certain circumstances an appeal from the Full Court to the High Court of Australia is possible.

The grounds for divorce

As mentioned earlier in this paper, the only necessary ground for the dissolution of marriage in Australia is that it has broken down irretrievably. This ground is established once the court is satisfied that the parties have been separated for 12 months and there is no reasonable likelihood of cohabitation being resumed. As reconciliation is encouraged wherever possible, a resumption of cohabitation for a period of up to 3 months does not prevent the 12 month period from accumulating, although the resumption period is not, of course, calculated as part of that period.

Although it is impossible to file the necessary papers before the 12 month separation period has elapsed other proceedings (ancillary proceedings) can be started at any time.

Maintenance and Property

Maintenance proceedings are those most frequently started soon after the separation period has begun and may be heard in either a Magistrate's Court or the Family Court. Most applicants in maintenance proceedings are women, although there is nothing in the *Family Law Act* to prevent men from obtaining financial support from their wives. The conditions which must be satisfied before there is a maintenance entitlement at all are: (1) that the person seeking it is in financial need; and (2) the person from whom it is sought has the capacity to pay. Once these criteria are satisfied the court must take into account in determining the amount payable considerations such as: the age and state of health of the parties, their respective financial needs, obligations and resources and their capacity to obtain appropriate employment (*see* Section 75 (2)). Maintenance may be ordered to be paid in a lump sum or periodically; for example weekly, monthly, or yearly.

The above refers specifically to spousal maintenance. The position regarding maintenance of children of the marriage is somewhat different, although the criteria set out in Section 75 (2) are again used to determine the amount payable. Section 73 of the Act provides that both parties to a marriage are liable, according to their respective financial resources, to maintain their children. Of course, where a mother is not in employment, the financial responsibility falls entirely on the father, but there are many instances today where mothers are working and their earnings are taken into account when children's maintenance is in question. In determining whether a maintenance order for a child is appropriate in the circumstances, the court will look at any income or financial resources the child may have, although such cases are rare. Where a child is mentally or physically handicapped or needs to complete his or her education, a maintenance order may continue beyond the eighteenth birthday.

Judges have wide discretionary powers in the area of matrimonial property, the most common application being one

regarding the matrimonial home. Because of constitutional limitations, an application for an order concerning property cannot be made unless dissolution proceedings have been commenced or completed, that is until the twelve month separation period has elapsed. This has caused injustices to occur, for example where the spouse who is the sole registered proprietor attempts to sell the property, or the one in residence allows it to run down and depreciate in value. Amendments to the *Family Law Act* currently before Parliament will enable property proceedings to be instituted by one or other of the spouses at any time.

The court's power extends to making such orders as it thinks fit altering the interests of the parties in the property. In making such orders it is directed by Section 79 (4) to take into account the following factors:

a the financial contribution made directly or indirectly by or on behalf of a party or a child to the acquisition, conservation or improvement of the property, or otherwise in relation to the property;
b the contribution made directly or indirectly to the acquisition, conservation or improvement of the property by either party, including any contribution made in the capacity of homemaker or parent;
c the effect of any proposed order upon the earning capacity of either party;
d the matters referred to in subsection 75 (2) so far as they are relevant; and
e any other order made under the Act affecting a party.

In addition, the matters referred to in Section 75 (2) must be taken into account.

An object of the *Family Law Act* as a whole is to encourage parties to arrange their own financial affairs without recourse to litigation. Regulation 96 of the *Family Law Regulations* allows the court to order a conference to be held before a registrar to enable the parties to discuss and make a bona fide effort to reach agreement on matters in dispute. The registrars are lawyers, and although the practice varies somewhat from court to court, Regulation 96 conferences are usually ordered whenever practicable. They have a high success rate, frequently resulting in a written agreement which the court will sanction if it considers it appropriate.

Custody and Access

Section 61 (1) of the *Family Law Act* specifies that during the marriage, and until a court order alters the position, each party to the marriage is joint custodian and guardian of children of the marriage while they are under the age of eighteen. As the Act is at present (pending the amendments referred to earlier) 'children of the marriage' is narrowly defined to exclude step-children and ex-nuptial children of either party. Thus references to 'children' are to children under eighteen years born to the husband and the wife, or adopted by them both during the marriage.

Each Family Court in Australia has as an integral part of its staff court counsellors whose training is in either social work or psychology. These court counsellors deal mainly with custody and access difficulties and, as with the registrars, a major aim of their service is to keep parties and their children out of litigation. In most cases the information that comes out in counselling sessions is privileged, that is, it cannot be disclosed in court but remains confidential. However, in other cases a judge may direct a counselling session to elicit some information that he or she considers should be put before the court to assist it in making a decision. In that case it is the counsellor's responsibility to prepare a report for the judge (e.g. on the child's relationship with a step-parent) and present this report in court and possibly be cross-examined on it. In the course of the preparation of the matter the counsellor may talk to the child(ren) involved and their parents, and possibly step-parents, grandparents and/or teachers as well.

Due to the successful conciliation procedures of the court, only a small minority of custody cases are heard before a judge. In 1977 a sample of cases involving children showed that in 14 per cent of cases both parties attended court and obtained an order from the judge regarding their children (Horwill, 1979). Whilst no figures have been produced since then, and different courts have varying procedures and staff loads, it is likely that that figure would be lower now.

Where a custody dispute is litigated the *Family Law Act* contains several provisions designed to protect children and clarify their rights. Firstly, the court must take into account the wishes of a child who has attained the age of fourteen years, unless there are special circumstances. Secondly, the court, individual or an organisation may seek separate legal representation for a child where it appears necessary. In this case, the representation will be paid for by the legal aid organisation operating in the State concerned.

The impending amendments contain clauses that (i) eliminate the age of fourteen as the requisite one for the following of wishes and (ii) enable children of the marriage to institute their own proceedings for custody, guardianship, maintenance or access.

The *Family Law Act* espouses the principle that the court regards the welfare of the child as the paramount consideration. This means that the child is the centre of custody and access disputes. There are several 'rules of thumb' which act as guidelines in determining a defended custody hearing. It is no longer a principle in Australian family law that the mother is necessarily the appropriate custodian of a young child. The court will look at all the circumstances of the competing households and at the relationship the child has with both parents and any 'significant others' in the households. However, judges are loath to change a child's living arrangements if he or she is in a particular household and has been there for any length of time. The concern here is the risk of the child's welfare being disturbed by a break in continuity. Traditionally (but perhaps less so now) courts have been unhappy about separating siblings from each other unless they are far apart in age or temperament.

A defended custody hearing will have one of several possible outcomes, the major ones being:
(1) One parent will be awarded custody of the child(ren) with access to the other parent reserved.

The effect of this is that the custodial parent has the physical and legal responsibility for the child, whereas the access parent has the right to see the child on days which it is hoped can be agreed upon by the parents and (according to his/her age) the child. Where agreements about access cannot be made, the court will specify days, times and sometimes venues for access. However, the court is reluctant to make a defined order and prefers to leave access reserved so that there is room for flexibility. In a very few cases access will be denied or greatly restricted. A denial must be made within the context of what is best for the child(ren), but where a non-custodial parent is violent or mentally unstable, access will be considered inappropriate.

(2) The court may order that the parents have joint custody. The effect of such an order is that each parent has an equal opportunity to make decisions about the child's upbringing, over and above the day to day management. Unless the parents live very close to each other, the child is unlikely to spend an equal amount of time actually with each. One parent may have 'care and control', which involves the daily care, whilst the other shares with that parent decision-making about the child's future, educational progress and other larger issues.

Whenever a divorce application is made and there are children under eighteen years involved (regardless of whether or not a custody order is sought), the applicant is required to set out in written form details regarding the living arrangements made for the child. The court will not permit a decree nisi to become absolute unless it is satisfied that proper arrangements in all the circumstances have been made for the child's welfare or there are circumstances why this requirement should be dispensed with. If the court has some doubt about the adequacy of the arrangements regarding the child, it may adjourn the proceedings until a report explaining the arrangements has been made by a court counsellor.

It is only upon the issue of a decree absolute that a marriage is legally terminated and remarriage permittted. The *Family Law Act* specifies that the decree nisi becomes absolute one month after the decree is pronounced, although the court has the power to extend or reduce this period.

Children and Divorce

While there were 276 088 children under eighteen between 1976 and 1980 (see Table 3) directly affected by the divorce of their parents, there were undoubtedly many more whose parents separated but did not divorce during this period. However there are no figures on this, and unfortunately Australian data on the impact of divorce on children is limited. On the one hand it is possible that the separation and divorce of their parents may be a blessing to some children (Burns, 1980) because they may be worse off with parents who have a conflicted but intact marriage. It is important to remember that it is the *process* of events leading up to separation and divorce which is commonly the most disturbing time for children (Harvey, 1981), and that many of the adverse effects on children which are attributed to divorce actually pre-date the divorce.

On the other hand there is considerable evidence available that reveals that the impact of the separation/divorce process on children is significant and long lasting (Wallerstein, 1980). The acute stage of family breakdown is the time just before and after the parents actually separate. In young children this may precipitate a crisis reaction characterized by regression, vomiting, overactivity and disturbed sleep with nightmares. However, the separation may have been preceded by a long period of disturbance within the family as the marriage fell apart. Some children regularly witness violence in the home and are used by their parents as emotional supports or weapons — this of course is extremely destructive and damaging to the child. It is always difficult to measure how much of a stressful situation registers with any particular child. What must be taken into account is the child's sensi-

tivity, age, sex and intelligence. Another important factor in the child's experience is the ability of his or her parents to cope with the crisis. It is common for adults to feel lonely, incompetent, alienated and depressed when they become aware of the inevitability of the marriage breakdown. Mothers may feel trapped by their children and fathers shut-out.

Therefore it is common for adults to be less able to operate as parents just when their children need them most. This can accentuate the child's grief and confusion. For some children it can be seen that the stress of the parents' marriage has been far greater that their separation — where violence and/or alcohol have characterised the relationship — thus removal of the source of upheaval may be a beneficial step.

For most children, however, separation from a parent is undeniably traumatic, and the extent to which the trauma persists depends on factors quite beyond that child's control. Post-divorce stress depends on the parents' ability to resolve their emotional problems. Many continue their battles with each other, using the child as a pawn. Children whose anxieties persist tend in general to distort the explanations of the divorce, sometimes increasing their contribution to it and therefore blaming themselves, or hopelessly wishing for a reunion of their parents even where this is obviously unrealistic. At this stage truancy, running away from home and general attention-seeking behaviour may appear.

Of course, many children do not only have to cope with the loss of the day to day contact with a parent. They, and the parent with whom they remain, may be obliged to move, which disrupts schooling and friendships. The reduction in living standards which single parents frequently experience may also mean that pre-separation living standards cannot be maintained (Prosser, 1981). Also, where the marriage breakdown has been an unpleasant one, contact with grandparents, cousins and other members of the extended family may suffer or be lost.

Another result of divorce for the adults concerned is the possibility of remarriage and this also dramatically affects childrens' lives, involving them in new relationships with a step-parent and the possibility of step-siblings and half-siblings.

It has been estimated from current divorce and remarriage figures that by 1990, 25-30 per cent of Australian children will be raised in households in which one of the adults is not their biological parent. Little is known about the specific effects of divorce on children, but even less is known about their experiences in a remarriage. As we have seen, remarriages seem to be at greater risk of break up than first marriages, so there is a possibility of further upheaval in the lives of some children.

Review

For a variety of reasons, be they related to policy formulation and administration, moral concerns, demographic planning and forecasting, financial planning and expenditure, or other factors, divorce in Australia has been the subject of widespread interest. The Family Court of Australia deals with controversial matters which involve changing and often conflicting moral and social attitudes. Public debate on a variety of issues related to divorce in Australia has been widespread and, at times, heated.

Justice Elizabeth Evatt (1978) has considered some of the critical comments made concerning the Family Court, and has concluded that many of them relate to 'matters which it is outside the power of the Court to control'. For example, some say that divorce has become too easy, yet under the old law when both parties wanted a divorce it could, in fact, be obtained with more ease and speed than today by using the often spurious 'fault' grounds. Today there is a waiting period of twelve months.

Perhaps a more serious problem is the absence of jurisdiction of the Family Court of problems concerning custody of the children, property and maintenance. The court can only deal with the children of the parties to a particular marriage and not with step-children or children born outside marriage. As Harrison (1981) points out, this arises through the wording of the Australian Constitution (Section 51 (xxi) and (xxii)), such that non-marital relationships and children of such relationships are insufficiently connected with marriage to come within Commonwealth power.

In relation to property, the Court can deal with property disputes only when an application for dissolution has been filed. Thus between the period of marriage breakdown and the filing of an application for dissolution the court's power is limited to granting injunctions with no final settlement of the extent of this injunction power. In a recent submission to an Institute of Family Studies Family Impact Seminar (Stewart, 1982) the Women's Electoral Lobby reported that they had received numerous complaints alleging unfair distributions of family assets between spouses, and that 'fault', which has been eliminated from divorce itself, has been retained in property settlements to the detriment of the system and the parties concerned. In addition, it is not uncommon for the

more financially worldly partner of the marriage to have made sure that there are few assets available when the time comes for their disposition. Some discussion has been raised concerning the introduction of equal marital property rights as exist in countries such as Holland, West Germany, the Scandinavian countries and more recently in nine States of the USA (Women's Electoral Lobby, 1981).

There has been some discussion regarding the 'openness' of the Family Court and publicity about its proceedings. The Act requires the court to be closed (s.97) and prevents the publication of information about proceedings (s.121). This was, however, one of the terms of reference of the recent Joint Parliamentary Select Committee, and is currently the subject of discussion (Family Law Amendment Bill, 1981). As Evatt, C.J. (1978) points out, the issue is a basic one — that of public interest and scrutiny of courts as opposed to personal privacy. In the Second Reading of the Family Law Amendment Bill, the Attorney-General stated that it provides that 'proceedings under the *Family Law Act* are to be held in open court and although the absolute prohibition on the publication of details is removed, it prevents publication of details that would identify individuals involved in proceedings'. This was the recommendation of the majority report of the Joint Select Committee and the Family Law Council.

One of the aims of the *Family Law Act* was to reduce delay in divorce proceedings, and this has continued to be a major concern, particularly in contested cases and those concerning custody, property and maintenance applications. Evatt, C.J. (1978) recommends that it is 'possible, practicable and desirable to cut down on the number of contested hearings by expanding the Court's conciliation service', that is, the court counsellors and the registrars. If the Family Law Amendment Bill becomes law, undefended divorce applications may be dealt with without either the parties or their legal representatives needing to attend the court, and this 'divorce on the papers' should provide significant savings of court time.

The Family Court, the Family Law Council, and the Institute of Family Studies have been established to cope with, monitor, and research families, marriage and divorce in Australia. Such organisations were set up as a response to changing attitudes and norms and resulting legislative changes. There is little doubt that such changes will continue.

Bibliography

AUSTRALIA: Joint Select Committee on The Family Law Act (1980), *Family Law in Australia: a report*. AGPS, Canberra, 2 volumes.

BURNS, A. (1980), *Breaking up: separation and divorce in Australia*, Nelson, West Melbourne.

DUNNELL, K. (1976), *Family formation 1976*, Office of Population Censuses and Surveys, HMSO, London.

EDGAR, D. E. (1981), 'The new family law, divorce and remarriage in Australia'; paper presented at 19th International Committee on Family Research, Seminar on Divorce & Remarriage, Leuven, Belgium. (Unpublished)

EVATT, E. (1978), 'The administration of family law'; paper presented as the Sir Robert Garran Memorial Oration, Adelaide, 15 November.

HARRISON, M. (1982), 'Informal marriages', revised edition, *Working Paper No. 1*, Institute of Family Studies, Melbourne.

HARVEY, L. (1981), 'Constructive management of the separation process'; paper presented at the conference *Parenting after Separation*, Canberra, July 22-25. (In press).

HORWILL, F. (1979), 'The outcome of custody cases in the Family Court of Australia', *Conciliation Courts Review*, 17,(2): 31-40.

McDONALD, P. F. (1974), *Marriage in Australia: age at first marriage and proportions marrying, 1860-1971*. Australian National University, Canberra.

McDONALD, P. F. (1980), 'Marriage and divorce in Australia', chapter prepared for ESCAP Monograph. (In press).

OZDOWSKI, S. A. and HATTIE, J. (1981), 'The impact of divorce laws on divorce rate in Australia: a time series analysis', *Australian Journal of Social Issues*, 16 (1): 3-17.

PROSSER, B. (1981), 'Families and work', *Family Information Bulletin No. 1*, Institute of Family Studies, Melbourne.

STEWART, D. E. (ed.) (1982), *Family Impact Seminar, Sydney 17/18 November, 1981*. Institute of Family Studies, Melbourne.

WALLERSTEIN, J. S. (1980), 'The effect of divorce on children'; address to the Australasian Conference on Family Law, Queenstown, New Zealand, 14 July.

WATSON, R. S. (1980), 'The resolution of spousal conflict'; address to the Australasian Conference on Family Law, Queenstown, New Zealand, 14 July.

WOMENS' ELECTORAL LOBBY (N.S.W.) (1981), 'Discussion paper on reform of marital property laws in Australia by means of a system of community of property', Women's Electoral Lobby, Sydney.